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No. 07-257

FILED
OCT 10 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the Supreme Court of the United States

CONTINENTAL CARBON CO. AND CHINA SYNTHETIC RUBBER CORP.,

Petitioners,

v.

ACTION MARINE, INC. ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

As explained in the petition, review is warranted because this case exemplifies a pervasive tendency among lower courts to apply the three *BMW* guideposts mechanically, weakening their ability to protect against arbitrary and excessive deprivations of property. These courts have lost sight of the significant constitutional concerns that large punitive damages awards raise, and their decisions undermine each guidepost's vital role in ensuring that the absolute amount of punitive damages is no more than reasonably necessary to satisfy the State's interest in punishment and deterrence.

Respondents say virtually nothing about this disturbing trend. Instead, they attempt to avoid review by arguing that CCC has "unclean hands," mischaracterizing the record, and picking nits with our contention that the lower courts are divided regarding the proper application of the three *BMW* guideposts. But respondents' invocation of discovery sanctions and their assertions that we have understated the level of misconduct cannot obscure the fact that the Eleventh Circuit upheld the astonishingly large exaction in this case without ever once asking whether a less severe punishment would have adequately satisfied Georgia's interests. Meanwhile, respondents' efforts to demonstrate that the Eleventh Circuit's application of the three guideposts is fully consonant with the decisions of other courts are transparently inadequate and, in many ways, serve only to confirm the pressing need for further guidance from this Court.

A. Respondents Mischaracterize The Record In An Attempt To Distract The Court From The Significant Legal Issues Raised By The Petition.

Respondents claim that we "failed to advise this Court of the full depth of [CCC's] misconduct, the extent to which [its] actions were compounded by litigation misconduct at trial, or that the documents [it] failed to produce until after trial would have supported a larger award." Opp. 2 (capitali-

zation altered). Thus, in their view, this case "provides a poor vehicle for review of any conflicts that might exist within the circuits over punitive damages." *Id.* at 13. But it is respondents, not CCC, that have taken substantial liberties with the facts. To set the record straight:

- Respondents malign our evidence that CCC installed the best available pollution control technology ("BACT"), claiming "[t]hat is not what the jury found." Opp. 1. But the jury made no finding either way. Dkt. 216, 217. And even if the jury had "implicitly rejected" this evidence (Opp. 12 n.6), that would in no way diminish our point: State agencies—not juries—determine the BACT. Pet. 3 n.1. Here, ADEM determined that CCC's thermal oxidizer and other equipment were the BACT. *Id.* at 3. It is telling that respondents harp on bagfilter problems without mentioning the thermal oxidizer, which was designed to incinerate any carbon black not captured by the bagfilters. *Ibid.*
- Respondents assert that we "misrepresent[ed]" the record by contending that "uncontradicted evidence showed that [CCC] identified and remedied the causes of emissions when they occurred," pointing out that discharges were not visible at night. Opp. 4 & n.2. But CCC installed Triboguards to detect solid particles in the waste stream. Pet. 3. Moreover, PX17 shows that each time there was a leak, CCC employees investigated and repaired it. Respondents' complaint below was merely that CCC should have built new facilities earlier instead of continuing to repair old ones.
- Respondents maintain that CCC "did not remedy any of those problems or replace any equipment until after this case was filed" and that "the bulk of [CCC's] equipment problems were not addressed until after the jury returned its verdict." Opp. 6. This is false. The complaint was filed in 2001. Dkt. 1. Before then, CCC had repaired leaks as they occurred (PX17) and replaced the filter

bags every six months (R74). CCC also fixed the accumulator tank system and tail gas leaks in Unit 1 and "pretty much" solved the Unit 2 problems by adding two additional bagfilter compartments in 2003 (Pet. 4; R167, 182, 385)—long before the verdict on August 25, 2004.

- Respondents' description of the testing results (at 5) is misleading. They intimate that only "[o]ne sample collected at the Rigdon Park baseball field and one at Memorial Stadium" tested negative. *Ibid.* But negative samples were also collected from Whopper Field (R1447, 1476, 1613, 1795-96), the South Commons concession stand area (R1447-48, 1611-12; DX162, at 4), the interior of the Civic Center (R1445-46), and the Civic Center vehicles (R1464). As to the positive samples, respondents fail to mention that testing showed only insignificant amounts of carbon black in all but one, meaning that CCC's emissions did not cause the discoloration. Pet. 5; see R1817, 1863-64. In any event, our point is not that there was an "injustice" (Opp. 5), but simply that the award of compensatory damages for *all* of these properties was "substantial" by any definition and manifestly constituted "complete compensation." Pet. 16.
- Respondents contend that CCC "intentionally harmed people," relying on the jury's finding that CCC acted with a "specific intent to cause harm to the plaintiffs." Opp. 1, 3. But the instructions equated "specific intent to cause harm" with the belief that harm was "substantially certain" to result. Pet. App. 12a-18a. Respondents never argued at trial that CCC maliciously desired to cause harm—only that CCC knew that property damage would occur if it failed to prevent emissions.
- Respondents argue that carbon black emissions risked "the health of the community" because CCC's Material Safety Data Sheets ("MSDSs") indicate that carbon black is a "possible human carcinogen" and a "hazardous substance." Opp. 6 n.4. But the MSDSs show that

OSHA and other bodies have *not* designated carbon black as a possible carcinogen. Pet. 5 n.3. While IARC has done so based on rat inhalation studies, even it concluded that "[t]here is inadequate evidence in humans for the carcinogenicity of carbon black." *Ibid.* Moreover, the other hazards identified by OSHA arise only after carbon black exposure of a certain amount and duration. PX32-8. Respondents never showed that CCC's periodic, atmospheric releases of carbon black met those thresholds.

- Respondents repeatedly reference the district court's imposition of discovery sanctions against CCC for withholding documents, as well as its finding that this litigation misconduct prejudiced respondents at trial and on appeal. See Opp. 1-4, 13. But respondents fail to mention that the documents withheld are not a part of the record here (Dkt. 306) and produced a separate money judgment of $120,945.59 (Resp. App. 2a). Moreover, the trial court's finding that respondents were prejudiced on appeal was based on its erroneous belief that CSRC challenged "direct liability" on appeal (*id.* at 26a), which it never did (Pet. App. 1a n.1). While respondents insinuate that documents uncovered post-trial concern causes and remedies of emissions and thus are "germane to assessing the reprehensibility of [CCC's] conduct" (Opp. 4), it is clear from the sanctions order that they received those documents *in 2003*—well *before trial* (Resp. App. 9a-10a).

The purpose of these examples is not to challenge the jury's liability findings (cf. Opp. 1, 3), but to challenge the amount of punitive damages awarded, which is reviewed *de novo* (Pet. 10). In *BMW*, for instance, the jury found both fraud and an intent to injure, and those findings were affirmed by the Alabama Supreme Court. See *BMW of N. Am. Inc.* v. *Gore*, 646 So. 2d 619, 622-23 (Ala. 1994); Ala. Code § 6-11-20(b)(1). But that did not prevent this Court from granting review and finding $2 million to be excessive pun-

ishment. So too here: The foregoing examples help to show that, despite respondents' attempt to demonize CCC, the true nature of CCC's conduct cannot justify a $17.5 million exaction. Even if respondents' characterizations of CCC's conduct were accurate, however, that conduct would still pale in comparison to the large-scale, life-threatening fraud in *Boerner*, the death threats in *Planned Parenthood*, and the intentional targeting of vulnerable individuals in *Kemp* and *Johnson*. Pet. 12-13. Review is warranted to clarify that multimillion-dollar punitive awards "tantamount to severe criminal penalt[ies]" (*BMW*, 517 U.S. at 585) should be reserved for cases of "egregiously improper" misconduct (*id.* at 580) in which the compensatory damages and other costs borne by the defendant are clearly insufficient to accomplish the State's interests in deterrence and retribution.

B. Respondents' Attempt To Demonstrate The Absence Of Confusion Over The Three Guideposts Has Just The Opposite Effect.

Respondents deny that the lower courts are divided as to the proper application of the three *BMW* guideposts and claim that it is only CCC that is "confound[ed]." Opp. 13-23. But respondents' effort to demonstrate the absence of confusion has precisely the opposite effect. It shows not only that there are in fact divisions among the courts but, more importantly, that the confusion is undermining the guideposts' usefulness in ensuring that defendants are not deprived of property arbitrarily and have fair notice of the extent of the punishment they can suffer.

1. Reprehensibility. After falsely stating (at 13) that we did not present a question for review on the comparative nature of the first guidepost (see Pet. i), respondents try to dismiss the conflict on this issue by arguing that we "confound two rightly separate analyses: ascertaining the degree of reprehensibility, and ascertaining appropriate damages once reprehensibility has been decided." Opp. 14. The first guidepost, respondents contend, involves only the former analysis,

which simply requires that courts consider the five "factors" set forth in *State Farm*. *Id.* at 14-15.

But it is respondents who are mistaken. The narrow conception of the reprehensibility inquiry to which they and the Eleventh Circuit subscribe is irreconcilable with this Court's statements on the subject. The Court made clear in *BMW* that the first guidepost requires courts to ask whether the conduct is heinous enough to warrant the amount of punishment imposed. In other words, the "punishment should fit the crime." 517 U.S. at 575 n.24. It therefore is not sufficient to ask "Is the conduct bad?," as the Eleventh Circuit did; the conduct has to be bad to warrant any punitive damages in the first place. Pet. 23. Instead, for this guidepost to serve as a constraining force, courts must also ask whether "the extraordinary size of the award * * * is explained by the extraordinary wrongfulness of the defendant's behavior" (*BMW*, 517 U.S. at 595 (Breyer, J., concurring)). And it is impossible to do that without attempting to place the conduct on a spectrum of reprehensibility by comparing it to other punishable conduct.

Tacitly recognizing this point, several courts have compared the conduct before them to other punishable conduct when applying the first guidepost. See Pet. 11.[1] Others have engaged in a similar exercise when determining whether the gravity of the offense justifies the absolute amount of the punishment (see cases cited at Chamber of Commerce Am. Br. 9), which is much the same thing, respondents' assertions to the contrary (Opp. 16-17) notwithstanding. Unfortunately, many other courts apply the *State Farm* factors in a vacuum, declaring the misconduct before them to be "reprehensible" without any consideration of where it ranks on a spectrum of reprehensibility. See, *e.g.*, *Diesel Mach., Inc.* v. *B.R. Lee Indus., Inc.*, 418 F.3d 820, 839-40 (8th Cir. 2005); *Rhone-*

[1] Respondents' claim (at 16) that none of these cases "engage[d] in a comparative analysis in order to assess the degree of reprehensibility" is simply wrong, as a review of the cases will show.

Poulenc Agro, S.A. v. *DeKalb Genetics Corp.*, 345 F.3d 1366, 1370-71 (Fed. Cir. 2003); *Hayes Sight & Sound, Inc.* v. *ONEOK, Inc.*, 136 P.3d 428, 446-47 (Kan. 2006). This Court should resolve the conflict.

On the merits, respondents argue that it would be unduly burdensome for reviewing courts to have to engage in a comparative reprehensibility analysis. Opp. 15-16. But it doesn't take a whole lot of time or effort to conclude that a failure to act more aggressively to prevent the escape of a non-toxic substance is much less reprehensible than a malicious battery, a conspiracy to intimidate through death threats, a scheme to defraud the vulnerable, or the deliberate dumping of a dangerous substance (to name just a few more egregious forms of misconduct). Nor would it be unduly time-consuming for a court to perform the legal research necessary to confirm that a punishment of $17.5 million is much higher than the punitive awards permitted for materially more serious misconduct. Indeed, as with any other legal issue, the parties can be expected to bring the most salient cases to the court's attention.

Respondents also argue that *Cooper Industries, Inc.* v. *Leatherman Tool Group*, 532 U.S. 424 (2001), indicates that such comparisons should be made by the jury, not reviewing courts. Opp. 16. In fact, *Cooper Industries* made clear that it is no longer appropriate to leave such matters to the discretion of the jury because "the theory behind punitive damages has shifted toward a more purely punitive (and therefore less factual) understanding." 532 U.S. at 437-38 n.11; see also *id.* at 440 (noting that appellate courts are well suited to make "broad legal comparison[s]").

Finally, respondents contend that the court below "found that none of the instances Petitioners had proposed for comparison were, in fact, similar to the case at hand." Opp. 17. Even accepting this generous reading of the opinion, it is undeniable that the court below was willing to consider only other cases involving the same conduct. Pet. App. 26a. But

nothing could be more arbitrary than to uphold a $17.5 million punishment that is millions of dollars higher than the exactions in cases involving materially more heinous conduct merely because the defendant could find no case with sufficiently similar facts to suit the reviewing court. Review is necessary to make clear that the court below erred by refusing to compare CCC's conduct to other punishable conduct when applying the first guidepost.

2. Ratio. Respondents' principal response to our contention that the lower courts need further guidance about the proper application of the ratio guidepost is to accuse us of "manufactur[ing] a mathematical bright-line straight-jacket out of precedential cloth that this Court has repeatedly, categorically, and wisely declared cannot be woven together" (Opp. 19). This contention is doubly misguided. First, bright line or not, it cannot be denied that several courts have read *State Farm* to create a presumption that the punitive damages may not exceed compensatory damages when the latter are "substantial." See Pet. 14-15. The split is real and growing. Second, respondents misunderstand this Court's refusal to endorse a single bright-line ratio. The Court was merely confirming the obvious: Because the amount of compensatory damages, the need for added deterrence, and the degree of reprehensibility will vary from case to case, no one ratio will mark the constitutional dividing line in all cases. That is a far cry from saying that it is hopeless to try to bring rationality and consistency to this guidepost.

Indeed, precisely because no single ratio is appropriate for all cases, the lower courts sorely need guidance about the considerations that should bear on proper application of this guidepost in any particular case. Here, for example, the Eleventh Circuit should have considered that the compensatory damages were exceptionally generous (compensating for remediation of properties that tested negative, for the ordinary debts of a business, and for the emotional distress of its owner), that CCC had to pay a massive amount of attorneys'

fees, that CCC had to pay millions to comply with the injunction imposed by the district court, and that CCC suffered significant reputational harm. And although it baldly asserted that CCC's tort was bad enough to warrant a 5.5:1 ratio, the court below should have considered the *relative* reprehensibility of CCC's conduct, which is far less heinous than the wide-scale, life-threatening fraud in *Boerner* or the repeated defrauding of a principal by its agent in *Doherty*, cases in which appellate courts concluded that a ratio of 1:1 marked the constitutional dividing line. See Pet. 14-15.

In addition, respondents barely address the two splits implicated by the Eleventh Circuit's treatment of attorneys' fees: whether such fees may be included in the denominator of the ratio, and whether their existence supports a lower ratio. Pet. 17-18. Respondents say nothing about the first split. They argue (at 24-25 n.9) that the second split is "illusory" because the fee awards in the cases we cited were small compared to the punitive damages. But if a small fee award reduces the permissible ratio of punitive to compensatory damages because of its punitive and deterrent effects, a large fee award does so to an even *greater degree*. See Pet. 17-18, 23-24. Contrary to respondents' supposition (Opp. 24-25 n.9), that is true even if the *purpose* of the fee award is to compensate. See Pet. 17 n.9, 23-24.[2]

3. Comparable Penalties. Respondents suggest that the division in the courts over whether the third guidepost requires comparison with penalties that are realistic, not merely hypothetical, isn't worthy of resolving because this Court has given the third guidepost "a lesser level of importance than it

[2] Respondents claim that a smaller punitive award would be inappropriate here because it would not "disgorge Petitioners of the unjust gain they realized from [the misconduct]." Opp. 20-21 n.7. Although they urged this point below, neither court embraced it. We explained the multiple flaws in respondents' disgorgement theory in our opening appellate brief at 55-59 and reply brief at 28-29.

has accorded to the other guideposts." Opp. 21. But that belief, which is shared by many courts (see Pet. 22), serves only to confirm the need for this Court to grant review and clarify that its statement in *State Farm* that there was no need to "dwell long on this guidepost" (538 U.S. at 428) meant only that the punitive award at issue self-evidently failed this test, not that the guidepost is of comparatively minor importance.

Without denying that the Eleventh Circuit engaged in rank speculation when applying the third guidepost, respondents claim that there is "no conflict that should engage this Court' attention." Opp. 22. Oddly, they ignore the cases that we said were in conflict with the Eleventh Circuit's approach (see Pet. 21). Instead, they assert that none of the cases on the same side of the divide as the Eleventh Circuit "demonstrate a flaunting of this Court's instructions." Opp. 23. Although that assertion would not eliminate the split (but serve only to condemn the Eleventh Circuit as an outlier), it is patently wrong, as a review of the cited cases will confirm.

* * *

We explained in the petition (at 29-30) that this case and *Exxon Valdez* are both excellent vehicles for providing the necessary guidance on the excessiveness inquiry, and we suggested that the Court may wish to either grant review in both cases or hold one pending its resolution of the other. Indeed, given the very substantial threshold maritime law questions presented by Exxon, there is even more reason for granting review in both cases to ensure that the Court can reach the excessiveness issue. Exxon's petition is currently scheduled for distribution on October 17 for consideration at the November 2 conference (one week after the scheduled conference for this case). CCC respectfully suggests that the Court reset this petition for that conference so that both petitions can be considered together.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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